Jefferson County Community Center, Inc. *and* Community Center Professional Employees Association, Colorado Education Association, NEA. Case 27-CA-7349

November 9, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 9, 1981, by Community Center Professional Employees Association, Colorado Education Association, NEA, herein called the Union, and duly served on Jefferson County Community Center, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on June 15, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 19, 1981, following a Board election in Case 27-RC-5990,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about June 3, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain "affirmative defenses."

On July 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Motion for Summary Judgment, Respondent admits the request and its refusal to bargain with the Union. It, however, challenges the Union's certification, reiterating its contentions in the underlying representation proceeding that the Board lacks jurisdiction over its operations; that the Regional Director improperly included certain employees and excluded certain others from the bargaining unit; that the Board improperly overruled certain of Respondent's challenges and objections to the first election; and that the Acting Regional Director improperly overruled its objection to conduct affecting the second election.

Review of the record herein, including the record in Case 27-RC-5990, reveals that on February 1, 1980, the Union filed a representation petition under Section 9 of the National Labor Relations Act. On June 27, 1980, after a hearing, the Regional Director issued his Decision and Direction of Election in which he found that the Board had jurisdiction over Respondent, rejecting Respondent's assertions that it was a political subdivision of the State of Colorado. He also found that Respondent possessed sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization. Further, contrary to Respondent's positions, he included in the bargaining unit certain employees who Respondent asserted were supervisors and employees who were working on 1-year Federal grants and he excluded employees not directly involved in client care or contact. The Regional Director directed an election in two voting groups consisting of professional and nonprofessional employees, respectively. Respondent filed with the Board a timely request for review of the Regional Director's decision in which it reiterated the arguments previously rejected by the Regional Director. On August 4, 1980, the Board denied Respondent's request for review.

Thereafter, the first election was conducted by mail and manual balloting. The professional employees voted 37 for, and 17 against, inclusion in the same unit with the nonprofessional employees, with 12 challenged and 4 void ballots. The overall

[1] Official notice is taken of the record in the representation proceeding, Case 27-RC-5990, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

tally revealed 60 votes for, and 59 against, the Union, with 18 challenged and 3 void ballots. Respondent challenged the 18 voters on the grounds that they were no longer employed and further asserted that certain of them had been improperly included in the unit. It also filed timely objections to the election alleging, in substance, that certain prounion alleged supervisors had intimidated antiunion or undecided employees; that there were irregularities regarding the mailed ballots; that a ballot of a professional employee should have been voided; that the Board agent interfered with the election; and that a ballot had been fraudulently cast by an ineligible employee. Thereafter, the Regional Director ordered a hearing on Respondent's challenges and objections. On November 6, 1980, the Hearing Officer issued his report in which he recommended that the challenges to certain ballots be sustained, that the challenges to the remaining ballots be overruled, that the objection relating to the fraudulently cast ballot be sustained, and that the remaining objections be overruled. He further recommended that if, after the issuance of the revised tally, the fraudulently cast ballot was determinative, the election be set aside and a second election be directed. Respondent filed timely exceptions to the Hearing Officer's report. On March 24, 1981, the Board adopted the Hearing Officer's report.

Subsequently, the ballots, the challenges to which had been overruled, were opened and counted and a revised tally issued which revealed that the fraudulently cast ballot was determinative. Therefore, in accordance with the Board's March 24 order (not published in volumes of Board Decisions), a second election was conducted on May 4, 1981. The professional employees voted 23 for, and 49 against, inclusion in the same unit with the nonprofessional employees, with 2 challenged ballots. In addition, the professionals cast 53 votes for, and 19 against, the Union, with 2 challenged ballots. The tally for the nonprofessional employees showed 17 votes for, and 55 against, the Union, with 2 challenged ballots.

Respondent filed a timely objection to the second election in which it contended that the Regional Office had interfered with the election by allowing the professional employees to vote again on whether they desired to be included in the same unit with the nonprofessional employees. The Acting Regional Director issued his Supplemental Decision and Certification of Representative on May 19, 1981, in which he overruled Respondent's objection, certified the Union as the bargaining representative of the professional employees, and certified the results of the election among the nonprofessional employees. Respondent filed a request for review of the Acting Regional Director's Supplemental Decision which was denied by the Board on June 19, 1981. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[3]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Jefferson County Community Center, Inc., a Colorado corporation, with its principal office and place of business at Arvada, Colorado, provides educational and health services for the developmentally disabled. During the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000, and purchased goods valued at $15,000 directly from points outside the State of Colorado.

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Respondent asserts in its answer to the complaint that it was not served with the charge, although it does not renew this contention in its response to the Motion for Summary Judgment nor in its response to the Board's Notice To Show Cause. The record reveals that Respondent was served with the charge.

Respondent also denies pars. 2(c), (d), and (e) of the complaint which allege that during the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000 and purchased goods valued at $15,000 directly from points outside the State of Colorado, that it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines, and that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Regional Director, in asserting jurisdiction in his Decision and Direction of Election, found that for the fiscal year ending June 30, 1979, Respondent had revenues of $3,724,222, that it purchased goods valued at approximately $15,000 directly from outside the State of Colorado, and received in excess of $220,000 annually from Federal funds which were transferred directly across state lines. Subsequently, the Board denied Respondent's request for review in which it raised the issue of jurisdiction, and Respondent does not now offer to adduce any new evidence.

In addition, it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/-student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees[4] and supervisors as defined in the Act, and all other employees.

2. The certification

On May 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 28, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.

Commencing on or about June 3, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about June 3, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

[4] The complaint inadvertently describes the appropriate unit as excluding professional employees, whereas it is clear from the record that nonprofessional employees are excluded from this unit of professional employees.

CONCLUSIONS OF LAW

1. Jefferson County Community Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

3. All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 19, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 3, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jefferson County Community Center, Inc., Arvada, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Center Professional Employees Association, Colorado Education Association, NEA, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Center Professional Employees Association, Colorado Education Association, NEA, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.

JEFFERSON COUNTY COMMUNITY CENTER, INC.